Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

..... Term, 76-1582

DAWN A. WHITMER,

Petitioner,

vs.

EDWARD H. WHITMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States

No. ....
October Term

DAWN A. WHITMER,

Petitioner,

vs.

EDWARD H. WHITMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Dawn A. Whitmer, prays that a Writ of Certiorari issue to review the opinion of the Superior Court of Pennsylvania entered November 22, 1976 which affirmed a decision of the Court of Common Pleas of Allegheny County, Pennsylvania in favor of respondent dismissing petitioner's action upon a final judgment of the Twentieth Judicial Circuit Court of Lee County, Florida. A subsequent petition for the allowance of an appeal to the Supreme Court of Pennsylvania from the opinion of the Superior Court of Pennsylvania was denied on February 15, 1977.

Opinions Below

The Order of the Supreme Court of Pennsylvania denying a Petition for an Allowance of Appeal is yet unreported and is

set forth at page 2a of the Appendix hereto. The opinion of the Superior Court of Pennsylvania, review of which is sought, is reported at PA.S ...., 365, At. 2nd, 1316 (1976) and is set forth in pages 4a through 12a of the Appendix hereto. The Pennsylvania Trial Court opinion in the litigation, set forth in the Appendix hereto at pages 13a through 24a is the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, filed December 10, 1974 dismissing Petitioner's action.

Jurisdiction

The judgment of the Superior Court of Pennsylvania was entered on November 22, 1976. A timely petition for Allowance of an Appeal to the Supreme Court of Pennsylvania was filed on December 17, 1976 and denied on February 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Question Presented

Whether a final judgment entered in the State of Florida, wherein, the Court had personal jurisdiction over the parties to this action, and where the title of one of the parties to personal property located in the State of Pennsylvania has been affected by said final order which purported to convey the same, is not entitled to full faith and credit in Pennsylvania?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Appendix hereto on page 1a and page 2a.

They include the following:

(1) United States Constitution, Article IV, Section 1

(2) 28 U.S.C. Section 1738.

Statement of Case

Petitioner brought this action in the Court of Common Pleas of Allegheny County, Pennsylvania on December 13, 1973 seeking a partition pursuant to Pennsylvania Law[1] of respondent's personal property located in Pennsylvania. Petitioner asserted that she had acquired an undivided interest in and to said property in Pennsylvania by reason of a final judgment of the Circuit Court of the Twentieth Judicial Circuit of Lee County, Florida. The Pennsylvania Court was requested to recognize and give full faith and credit to said foreign judgment. The Florida action arose out of a petition under the law of Florida for the dissolution of marriage filed by Dawn A. Whitmer on December 1, 1972. On January 31, 1973, Edward H. Whitmer personally appeared by filing an Answer to the pleadings. On October 1, 1973 a final judgment was entered dissolving the marriage and awarding *inter alia* to petitioner as lump sum alimony an undivided interest to certain personal property owned by respondent and located in Pennsylvania. The Florida order purported to act as a conveyance of the undivided interest in said personal property to the petitioner. Respondent took no appeal in the state of Florida.

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[1] Purdon's Pennsylvania Statutes, Volume 12, Section 1791. *et seq.* Partition of Personal Property Jointly Owned.

Petitioner's action for the partition based upon the Florida judgment was dismissed in Pennsylvania for the Trial Court. The Trial Court found as a matter of law that the final judgment in Florida as it related to the matters of the marital status of the parties as well as to the issue of alimony was entitled to full faith and credit in Pennsylvania by reason of the fact of the personal jurisdiction of the Florida Court over the parties. (App. page 19a). In dismissing the petition, the trial court found that the Florida alimony judgment as it applied to the respondent's assets in Pennsylvania was *in rem* because it imposed burdens upon the respondent's interests in assets which were beyond the territorial jurisdiction of the forum state. The trial court found further that the Florida decree "attempted" to award an interest in property located in Pennsylvania by attempting to create an interest in the same by way of a "lump sum alimony" award (App. page 21a). The trial court further found that under Pennsylvania law, as well as under the law of the state of Florida that there is no basis upon which to grant the relief sought in the petition, because of the fact that the subject property was titled solely in the respondent's name or in the name of the respondent and another not a party to the Pennsylvania action (App. page 23a). The opinion of the trial court which appears on Appendix page 13a through 24a indicated that the Florida Court lacked *in rem* jurisdiction over the subject matter despite the fact that said court had personal jurisdiction over the respondent.

An appeal to the Superior Court of Pennsylvania, a court of intermediate appellate jurisdiction, was timely filed and perfected. In an opinion filed November 22, 1976, which is the only appellate opinion filed in this case of which review by

this Court is sought, the decision of the trial court was affirmed (App. pages 4a-12a). The Superior Court in that opinion found that the *in personam* jurisdiction over the respondent of the Florida Court did not give that Court jurisdiction over his property in Pennsylvania (App. page 10a). The Superior Court of Pennsylvania found further that the basis of jurisdiction over the subject property is the presence of the same within the territorial jurisdiction of the forum state. The purported conveyance of the personality in question was ruled a nullity and not entitled to full faith and credit in Pennsylvania. The Superior Court relied upon *Hanson v. Denckla*, 357 U.S. 235, 78 S. CT. 1228, 2 L.ED. 1283 (1958) (App. page 10a).

Petitioner appealed to the Supreme Court of Pennsylvania by the filing of a Petition for Allowance of an Appeal to review the order of the Superior Court. Said petition was denied without the filing of a further opinion by the Supreme Court of Pennsylvania on February 15, 1977 (App. pages 2a, 3a).

Reasons for Granting the Writ

Because this court has not squarely addressed the issue presented by this case, a plethora of decisions in this area has resulted in general confusion and conflicting decisions regarding what, if any, exception to full faith and credit this court created by its celebrated 1909 decision in *Fall vs. Easton*, 215 U.S. 1, 30 S. CT. 3, 54 L.ED. 65 (1909).[2]

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[2] Barbour, The Extraterritorial Effect of the Equitable Decree, 17 Mich L. Rev. 527 (1919).

(Footnote continued on following page)

It is entirely foreseeable that the confusion will continue until this court renders a definitive decision in this area of law.

Fall vs. Easton has generally been recognized as creating a land exception to full faith and credit. That is to say a land situs forum need not recognize and afford full faith and credit to a sister state's judgment which directly affects title to land in the forum state.[3]

Albeit, that Fall may have created an exception to full faith and credit, the parameters and implementation of the same has been left to the states.

As a case in point, the state of Nebraska, from which the Fall decision was spawned, probably no longer follows the Fall exception. *Weesner vs. Weesner,* 168 NEB. 346, 96 N.W. 2d, 689 (1959).

> "It is also now well established that a court . . . in one state with all necessary parties properly before it in an

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(Footnote continued from preceding page)

Currie, Full Faith and Credit to Foreign Land Decrees, 21 U. Chi. L. Rev. 620 (1954).

Cook, The Power of Courts of Equity, 15 Col. L. Rev. 37, 106, 228 (1915).

Goodrich, Enforcement of a Foreign Equitable Decree, 5 Iowa L. Bull. 230 (1920).

Lorenzen, Application of Full Faith and Credit to Equitable Decrees for the Conveyance of Foreign Lands, 34 Yale L.J. 591 (1925).

Schwartz, Fall v. Easton Revisited, 54 Dick. L. Rev. 293 (1950).

Ehrenzweig on Conflict of Laws SS 51, 58 (1962).

Goodrich, Conflict of Laws, SS 218 (4th Ed. Scoles, 1964).

[3] As opposed to affecting the respective rights of the parties in and to the property.

> action for divorce, generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state in lieu of alimony for the wife. Such an order is personal in character and when final, it is generally res judicata, bringing into operation the Doctrine of Collateral Estoppel. Thus where all necessary parties are before a competent court in the land situs State, such an order will be given force and effect under the full faith and credit clause . . ."

The Pennsylvania Superior Court in the instant case, interprets and expands the Fall exception to include personal property. Therefore, because respondent's property happens to be located in Pennsylvania instead of Nebraska, petitioner is effectively denied the protections and the benefits of Article IV, Section 1 of the United States Constitution; a classic example of Murphy's Law in operation. Had this action been brought in Nebraska, the result would have been different. This Court has decreed previously that the full faith and credit clause is not to be applied accordian-like to accommodate personal predelictions of the Court, *Estin vs. Estin,* 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948). Further, this court has on numerous occasions stressed the utmost national importance of the Full Faith and Credit clause as the mortar that binds the states into a federal union. *Estin vs. Estin (Supra).* It is not surprising then, that since *Fall,* this Court has created a line of cases reemphasizing the national importance of Full Faith and Credit, and creating the doctrine of jurisdictional finality. See notably *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244, (1931), and *Treinies v. Sunshine Mining Company,* 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85, (1939), and more recently *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.

2nd 186, (1963). In the latter case, Mr. Justice Stewart said, "The Nebraska Court had jurisdiction over the subject matter . . . only if the land in question was in Nebraska."[4] But once Nebraska had decided the location of the land, and therefore the question of title, Missouri could not relitigate the issue between the parties.[5]

Mr. Justice Stewart then went on to say that "while this court has not before had occasion to consider the applicability of the Rule of Davis, Stroll and Treinies and Sherrer to a case involving real property, we can discern no reason why the rule should not be fully applicable."

Clearly if the land exception to Full Faith and Credit spawned by *Fall* is suspect, the claim for a personality exception is very dubious.

Nevertheless, the Superior Court of Pennsylvania relies on this Court's decision in *Hanson vs. Denckla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 1283 (1958), for the proposition that the jurisdiction of the Florida court over the person of Respondent did not give it jurisdiction *"in rem"* over his personality which was byond the territorial jurisdiction of the state of Florida, *e.g.* that the sole recognizable basis for jurisdiction over property[6] is the presence of the subject property within the territorial jurisdiction of the forum state despite identity of the parties in the respective proceedings and the conclusion that the non-situs forum had complete jurisdiction over the parties at all stages of the proceedings.[7]

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[4] The action was to quiet title.

[5] Even, presumably, if Missouri thought the land was within its boundaries.

[6] Presumably both personality and reality.

[7] A close reading of *Hanson vs. Denckla* will disclose that the court of first instance had neither *"in rem"* or *"in personam"* jurisdiction.

The Superior Court of Pennsylvania asserts that the Florida court in the Instant Case should have acted through the person of the appellee over whom it had jurisdiction instead of electing to proceeding *"in rem"* against the Pennsylvania property.

If the Florida Court was a court of competent jurisdiction, and there was identity of the parties in both forums as was concluded by the Pennsylvania Superior Court, the decision can only be explained by an interest analysis inasmuch as the Florida court could have ordered the respondent to deliver a chattel deed and requested full faith and credit to a later order without question.

An interest analysis will ultimately discern that Pennsylvania has no legitimate interest in insulating a resident from liability under a valid foreign decree and the fact that the property is located in Pennsylvania gives Pennsylvania no valid interest in who owns the property. The situs forum should only be interested in such things as the recording of instruments, the protection of innocent third parties, the payment of taxes and the assurance of free alienability. *Fall vs. Easton (Supra).*

Petitioner contends that the distinction drawn by the Pennsylvania Superior Court is arbitrary, unnecessary and is violative of the mandate of Article IV, Section 1 of the United States Constitution.

It is entirely foreseeable that a property situs forum may not always be able to exercise *in personam* jurisdiction over the person of the title holder. Is the effect of a judgment obtained in a non-situs forum thus to be rendered null and void because the situs forum cannot obtain jurisdiction over the

person of the title holder? In multi state cases, must the non-situs judgment be relitigated in every situs forum?

It is submitted, therefore, that continuing hit or miss application of full faith and credit by the states will continue until this court defines the *Fall* exception with more precision.

Conclusion

Wherefore, your petitioner, Dawn A. Whitmer, requests this Court to reverse the order of the Superior Court of Pennsylvania in so far as it fails to afford full faith and credit to the final judgment of the Twentieth Judicial Circuit Court in and for Lee County, Florida and to remand the same back to the Superior Court of Pennsylvania for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

ROBERT J. TRAGESER,
Attorney for Petitioner.

Of Counsel:
Robert H. Somerton.

APPENDIX

United States Constitution Article IV, Section 1 Full Faith and Credit Clause

Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

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28 U.S.C. 1783

State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory of Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and

credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Order of the Supreme Court of Pennsylvania Denying Petition

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Sally Mrvos
Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219

March 1, 1977

Robert J. Trageser, Esquire
Chatham Center Apt. Tower
Professional Suite
Pittsburgh, Pa. 15219

In Re: Dawn A. Whitmer, Petitioner v. Edward H. Whitmer No. 1218 Allocatur Docket

Dear Mr. Trageser:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"2/15/77

Petition denied.

Per Curiam"

An application for Reconsideration of Denial of Allowance of Appeal must be prepared in the same manner as the original petition (see Pa. R.A.P. 1111), must be confined to the grounds and must contain the certification set forth in Pa. R.A.P. 1123 (b) (1) and (2), and, in order to be timely, must be received within seven days after the date of mailing of this notice.

No answer to an Application for Reconsideration of Denial of Petition for Allowance of Appeal will be received unless requested by the Supreme Court on its own motion.

Very truly yours,

SALLY MRVOS,
Sally Mrvos,
Prothonotary.

SM:ban
cc: Richard C. Witt, Esquire
Suite 1010 Grant Bldg.
Pittsburgh, Pa. 15219

Opinion of the Superior Court of Pennsylvania

IN THE SUPERIOR COURT OF PENNSYLVANIA

Pittsburgh District

IN RE: DAWN A. WHITMER,

Appellant,

v.

EDWARD H. WHITMER,

Appellee.

No. 662 April Term, 1975
No. 688 April Term, 1975

Appeals from the Orders of Court of May 27, 1975 (No. 662) and December 20, 1974 (No. 688), of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, at No. 2885 January Term, 1974

OPINION BY VAN DER VOORT, *J.*
Filed: NOV 22 1976

Appellant brings this action for partition of jointly owned personal property located in Pennsylvania. Her claim to the property rests upon a judgment awarding her this property in-

terest as "lump sum alimony" in a Florida divorce action. Appellee's defense is a collateral attack on the Florida judgment as having been entered without due process of law and without jurisdiction over the Pennsylvania property.

The parties were married in Pennsylvania in 1946 and lived in this state until 1971 when appellant moved to Florida and established her domicile there. Appellee resides in Pennsylvania.

On December 11, 1972, appellant filed a complaint for dissolution of her marriage to appellee in the Twentieth Judicial Circuit Court in and for Lee County, Florida, demanding *inter alia* the adjudication of her rights in the stock and assets of Edward H. Whitmer Co., an unincorporated sole proprietorship owned by appellee, engaged in the rental of heavy equipment, principally cranes, and located in Pennsylvania.

Appellee was personally served with notice of the Florida suit, retained counsel who entered a general appearance on his behalf and entered into a contest of the merits of the case. Appellee's counsel accepted service of all pleadings filed thereafter.

On February 2, 1973, a motion was filed by appellant in the Florida court to appoint a receiver for appellee's interest in the business located in Pennsylvania. On March 5, 1973, a stipulation and trust agreement was signed by both parties and their counsel and filed with the Florida court wherein William Creehan, Esquire, of the Allegheny County Bar, was named as Trustee to sell the assets of the business and distribute the proceeds as the parties might further agree or as

the court might order. The Florida court never acted upon this agreement nor did the Trustee ever take possession of the Pennsylvania assets.

On March 14, 1973, the Florida court ordered appellee to make certain payments to appellant as temporary alimony and child support. This order was ignored by appellee and on June 25, 1973, he was adjudged in contempt of court and an order entered for his commitment in jail for a period of 6 months unless he purged himself of his contempt. Appellee stayed out of the state of Florida and was not apprehended.

On April 13, 1973, appellant filed interrogatories and a notice to appellee to produce certain records appertaining to his Pennsylvania business. Appellee failed to produce the required records and his answers to the interrogatories were found by the Florida court to be unresponsive.

On August 29, 1973, appellee's counsel petitioned the Florida court for authority to withdraw as counsel. The petition was set for hearing on September 10, 1973, but no order was entered in the matter. The parties are in dispute as to whether appellee's counsel continued to represent him after September 10.

On September 11, 1973, the Florida court, on the basis of a finding that appellee had failed to comply with its earlier order directing the production of documents and answers to interrogatories, entered an order directing (1) that all pleadings theretofore filed by appellee be stricken and declared null and void; (2) that a default judgment be entered against appellee in favor of appellant; and (3) that appellant proceed to final judgment *ex parte* without further notice to appellee.

On September 27, 1973, a final hearing was held, of which appellee was notified by mail by counsel for both parties. Neither appellee nor his counsel was present at the hearing.

On October 1, 1973, a final judgment was entered by the Florida court. The judgment dissolved the marriage of appellant and appellee; awarded custody of a minor child to appellant; awarded appellant all right, title and interest in and to all property owned by the parties in the state of Florida, as more particularly described in the judgment; and, finally, awarded to appellant an undivided one-half interest in the assets of Edward H. Whitmer Co. located in Pennsylvania. The Florida court purported to make a conveyance of this Pennsylvania property to appellant by the terms of its judgment. This portion of the Florida judgment read as follows:

"4. As and for the remainder of the lump sum alimony the Petitioner is awarded all right title and interest in and to an undivided one-half interest of all assets not referred to in paragraph 3 owned by Respondent in his sole name or jointly with any other person including without limitation the business known as the EDWARD H. WHITMER CO., located in Pennsylvania and any successor thereto formed subsequent to February 6, 1973, whether the business be operated as a sole proprietorship, partnership or corporation together with all of the assets of said business including without limitation the following:

4000 Manitowoc Crane
3900 Model M 100 Ton Manitowoc Crane

3900 Model M 65 Ton Manitowoc Crane
PH 666 Truck Crane
Gallion Truck Crane
Cash

"In the event the business or any part thereof or any of the assets of the business have been sold subsequent to the institution of this course of action on December 11, 1972 and the proceeds from such sale have been used for any other purpose other than to pay the valid debts and operating expenses of the business then in that event the Petitioner is awarded an undivided one-half interest in and to the said proceeds and any security therefore. *This judgment shall act as a conveyance to the Petitioner of the property awarded to her in this Paragraph 4.*" (Italics added)

Appellee did not appeal the Florida judgment nor take exceptions to it in the Circuit Court which entered it.

On December 13, 1973, appellant brought this action for the appointment of a trustee to sell the assets of the Edward H. Whitmer Co. and partition the proceeds pursuant to the Act of April 27, 1927, 12 P.S. 1791. That statute is applicable by its terms "whenever personal property is owned jointly, by persons who are not partners, or are not husband and wife and any one of such persons desires to dispose of his or her right, title and interest in said personal property, and cannot arrive at a satisfactory arrangement with the other owner or owners of such personal property for the disposition of such personal property..."

Appellee contests such a sale and partition of his Pennsylvania property on two grounds: (1) that the Florida judgment should not be recognized in Pennsylvania because he was denied due process of law in the Florida proceedings; and (2) that the Florida court had no jurisdiction over the Pennsylvania property in which it purported to convey to appellant an undivided one-half interest.

The first contention is without merit. If appellee was denied due process of law in the Florida court, his remedy was in that jurisdiction, either by further proceedings before that court or by appeal. The Florida judgment is not subject to collateral attack in Pennsylvania. The Florida court had jurisdiction over both parties. Appellant initiated the Florida action and resided in that state while appellee entered a personal appearance and contested the litigation.

The jurisdiction of the Florida court was not lost by the court's action in striking appellee's pleadings and proceeding *ex parte* or by the withdrawal of appellee's counsel, actual or threatened. Once jurisdiction has attached it exists for all times until the cause is fully and completely determined: *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353, 33 S. Ct. 550, 57 L. Ed. 867 (1913); *Commonwealth ex rel. Milne v. Milne*, 149 Pa. Superior Ct. 100, 104, 26 A. 2d 207 (1942).

We conclude that the Florida court had jurisdiction over the parties at all stages of the proceedings and that its judgment is entitled to full faith and credit in the courts of Pennsylvania: *Johnson v. Muelberger*, 340 U. S. 581, 587, 71 S. Ct. 474, 99 L. Ed. 522 (1951); *Harrison v. Harrison*, 183 Pa. Superior Ct. 562, 568-71, 133 A. 2d 870 (1957).

However, the jurisdiction of the Florida court over the person of appellee did not give it jurisdiction *in rem* over his property located outside the state of Florida. The basis of jurisdiction over property is the presence of the subject property within the territorial jurisdiction of the forum state: *Hanson v. Denckla,* 357 U. S. 235, 246, 78 S. Ct. 1228, 2 L. Ed. 1283 (1958); *Averby v. Gordon,* 177 U. S. 214, 222, 20 S. Ct. 603, 44 L. Ed. 741 (1900); *Rose v. Himely,* 4 Cranch 241, 277, 2 L. Ed. 608 (1808). Plainly it was beyond the jurisdiction of the Florida court to make a conveyance to appellant of a one-half interest in appellee's Pennsylvania property.

Having personal jurisdiction over appellee, the Florida court might have ordered appellee to convey a one-half interest in his Pennsylvania property to appellant and, if necessary, enforce its order by contempt proceedings. Presumably it did not do so because appellee was not physically to be found within the state of Florida. The court might also have followed through on the stipulation at one time in effect whereby appellee was to convey the Pennsylvania assets to a trustee who would hold them subject to the order of the court. For some unexplained reason, this stipulation was never acted upon.

But instead of acting through the appellee over whom it had jurisdiction, the Florida court elected to proceed *in rem* against the Pennsylvania property by purporting to make a conveyance of a one-half interest in it to appellant. This was beyond its power as ruled in *Hanson* and numerous other cases. Its purported conveyance was a nullity and cannot be given full faith and credit by a Pennsylvania court.

Such being the case, there is no basis on which to invoke the Pennsylvania statute governing the partition of jointly owned personal property because, absent the purported conveyance by the Florida court, the Pennsylvania property is not jointly owned.

There are two appeals in this case as a result of a procedural difficulty in the court below. Appellant filed exceptions to the dismissal of her motion for the appointment of a trustee and these exceptions were dismissed by the court *en banc* on the ground that her recourse was by appeal to this court rather than by exceptions filed in the lower court under either Rule 1038 or 1518. She has appealed from the dismissal of her exceptions by the court *en banc*. Subsequently, appellant was granted the right to appeal *nunc pro tunc* from the denial of her motion for the appointment of a trustee. Consequently, the procedural question has become moot in this case. If the ruling of the court *en banc* was an error, correction lies in a clarification of the rules.

In No. 688, the order of the trial court dismissing appellant's petition for the appointment of a trustee to partition jointly held personal property is affirmed. In No. 622, the appeal from the order of the court *en banc* dismissing appellant's exceptions is dismissed as moot.

SPAETH, *J.*, files a Concurring Opinion, PRICE, *J.*, dissents.

IN THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: DAWN A. WHITMER,

Appellant,

v.

EDWARD H. WHITMER,

Appellee.

No. 662 April Term 1975
No. 688 April Term 1975

Appeals from the Orders of Court of May 27, 1975 (No. 662) and December 20, 1974 (No. 688), of the Court of Common Pleas of Allegheny County, Penna., Civil Division, at No. 2885 January Term 1974.

CONCURRING OPINION BY SPAETH, *J.*:
Filed: Nov 22 1976

I agree with the majority's disposition of this case but I believe we should say explicitly that that disposition is without prejudice to appellant's right to seek a reformation of the judgment so that it could be enforced in Pennsylvania.

Opinion of the Court of Common Pleas

IN THE COURT OF COMMON PLEAS
Of Allegheny County, Pennsylvania
Civil Division

IN RE: Dawn A. WHITMER,

Petitioner,

and

EDWARD H. WHITMER,

Respondent.

No. 2885
January Term, 1974

OPINION

Silvestri, *J.*

The instant proceeding was brought before this Court on a petition to appoint a trustee and partition personal property pursuant to the Act of April 27, 1927, No. 294, 12 P.S. 1793 as amended. After exemplifications of record, depositions, and affidavits were filed and a hearing before the Court, the following facts were established.

1. The Petitioner Dawn A. Whitmer, herein Petitioner, and Respondent Edward H. Whitmer, herein

Respondent, were married in the Commonwealth of Pennsylvania in 1946.

2. Petitioner and Respondent maintained a residence at Clifton Road, Bethel Park, Allegheny County, Pennsylvania.

3. In 1951 the Petitioner and Respondent leased a home in Hollywood, Florida on a year-to-year basis until 1953 for use during the winter months.

4. In 1960 the Petitioner and Respondent purchased a mobile home located at Fort Myers Beach, Florida which they used until they purchased a home at 320 Beyland Drive, Fort Myers Beach, Florida.

5. In 1971 the Petitioner and Respondent sold the residence located on Clifton Road, Bethel Park, Pennsylvania, and Petitioner established her domicile in the State of Florida sometime prior to December, 1971, while Respondent continued to reside and work in Pittsburgh, Pennsylvania.

6. Petitioner filed a Complaint for Dissolution of Marriage in the Twentieth Judicial Circuit Court, Lee County, Florida on December 11, 1972 demanding *inter alia*, the adjudication of Petitioner's rights in the stock and assets of the Edward H. Whitmer Corporation, herein Corporation, and Respondent was personally served with notice of suit.

7. On January 31, 1973, Respondent retained Kjell Pederson, Esquire, who entered a general appearance on his behalf and entered into a contest of the merits of the

case. Attorney Pederson accepted service of all pleadings filed thereafter.

8. On February 2, 1973, a motion was filed by Petitioner in the Florida Court to appoint a receiver for Respondent's interest in the Corporation located in Pennsylvania.

9. On March 5, 1973 a Stipulation and Trust Agreement was signed by both parties and their counsel and was filed with the Florida Court. The Trust Agreement named William Creehan, Esquire, a member of the Bar of Allegheny County, Pennsylvania, as Trustee to sell the assets of the Corporation and distribute them as the parties further agree or as the Court might order. The Court never acted upon this Agreement nor did the Trustee ever take possession of the assets.

10. On April 13, 1973 Petitioner, through her attorney, filed Interrogatories and a Notice to Respondent to Produce certain business records and Respondent filed Answers thereto on July 23, 1973.

11. On August 28, 1973, Attorney Pederson notified Respondent that he was withdrawing as counsel.

12. On August 30, 1973 Attorney Pederson's Motion to Withdraw as Counsel was filed. On the same date Petitioner filed a motion to hold Respondent in contempt for failure to produce business records, of which Respondent through his attorney had notice.

13. On September 11, 1973 the Florida Court entered an order, striking all of Respondent's pleadings filed to

date, entered a Default judgment in favor of Petitioner, and directed Petitioner to proceed *ex parte*. Notice of this order was given to Respondent and Attorney Pederson, neither of whom took exception or appeal therefrom.

14. After a final hearing on September 27, 1973 of which Respondent was notified, an order of court was entered on October 1, 1973 granting Petitioner a divorce and awarded Petitioner as lump sum alimony an undivided one-half interest in the Respondent's assets in Pennsylvania, which consisted almost wholly of the Corporation. No Motion for New Trial, Rehearing, or Appeal was filed from that order by the Respondent.

DISCUSSION

Respondent argues that he was denied his constitutional right to basic fairness and this voids the Florida court's order and the Florida court order is invalid because it attempts to dispose of property without its jurisdiction.

We must determine if the Florida judgment is entitled to full faith and credit as it applies to the distribution of Respondent's assets located in Pennsylvania.

Since this action comes to this Court on a petition to enforce a partition of Respondent's assets located in Pennsylvania, we do not have the power to decide whether the due process rights of the Respondent were violated in the Florida litigation. Any such objections should have been timely raised in that court.

The order of court which delineates the interests of Petitioner in Respondent's property was an order for lump sum alimony which was part of the divorce decree entered.

The only proper basis for denying full faith and credit to an out-of-state divorce decree is lack of jurisdiction. A judgment in one State is conclusive upon the merits in every State if the court of the first State had jurisdiction to render the judgment. "Such a decree is a conclusive adjudication of everything involved therein except the jurisdictional facts on which it was founded." *Williams v. North Carolina (II)*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Commonwealth ex rel. McVay v. McVay*, 383 Pa. 70, 118 A.2d 144 (1955). Only bona fide domicile is the essential jurisdictional fact that gives such a decree extraterritorial effect. *Williams v. North Carolina (I)*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1944). Since Petitioner was a bona fide domiciliary of the State of Florida, the decree affecting the parties marital status is presumptively valid and recognized in this State. *Cook v. Cook*, 342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 146 (1951); *Esenwein v. Commonwealth*, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608 (1945); *Williams v. North Carolina (II), supra; Harrison v. Harrison*, 183 Pa. Super. 562, 133 A.2d 870 (1957).

However, a collateral attack here in Pennsylvania upon the jurisdiction of the Florida court cannot be made if the Florida court had *in personam* jurisdiction over the Respondent. In *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 (1951), the United States Supreme Court reaffirmed its rulings that such a collateral attack of a divorce decree in another state cannot be made if the defendant (herein Respondent) was personally served or entered a personal appearance in the proceedings. The only collateral attack permissible is one made in the court itself which granted the decree. This was followed in *Cook v. Cook, supra,* and *Harrison v. Harrison, supra.*

The significance of *in personam* jurisdiction over the Respondent by the Florida court is crystallized by the recent ruling of the Pennsylvania Supreme Court in *Stambaugh v. Stambaugh,* No. 178 Jan. Term, 1973 and No. 179 Jan. Term, 1973, opinion filed October 16, 1974. There, our Supreme Court found that a divorce decree, insofar as it relates to the marital status of the parties on the one hand and alimony on the other, is divisible, according to *Estin v. Estin,* 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948) which held that where the parties to a divorce were domiciliaries of different states, the defendant's state had to give full faith and credit to the decree of the sister state insofar as it relates to the parties' marital status, but not as to property rights or alimony.

In *Stambaugh,* the wife filed a divorce from bed and board in Pennsylvania in 1966. Husband established residence in Florida thereafter and was granted a divorce from the bonds of matrimony in Florida in 1969. Later, wife was granted $450.00 per month alimony *pendente lite* and $375.00 permanent alimony in a Pennsylvania court. Husband appealed the Pennsylvania ruling by contending that he was divorced by order of the Florida court and that court's decree did not provide for alimony or support. The Pennsylvania Supreme Court ruled that the divorce was divisible; that although Pennsylvania must give full faith and credit to the decree of Florida as it relates to marital status, Pennsylvania courts are not bound by the Florida ruling as to alimony *pendente lite* or property rights because "Florida did not have personal jurisdiction over the wife."

The Florida court had personal jurisdiction over Respondent so as to entitle its decree to full faith and credit as it related to marital status *and* to alimony. Respondent was personally served with notice of the divorce suit, had entered an appearance by and through an attorney, and filed an answer. Respondent alleges that from September 11, 1973 when the Florida court struck his pleadings, entered a judgment by default and directed Petitioner to proceed *ex parte,* all after Respondent's attorney withdrew, that Florida relinquished its jurisdiction over his person. By entering a judgment by default and having an *ex parte* proceeding, the court does not relinquish its jurisdiction over a person. Once a court obtains jurisdiction over a person, it retains such until the matter is finally resolved. *Commonwealth ex rel. Milne v. Milne,* 149 Pa. Super. 100, 26 A.2d 207 (1942); *Hurtt v. Stirone,* 114 P.L.J. 182, affirmed 416 Pa. 493, 206 A.2d 624 (1965), cert. denied, 381 U.S. 925. Judgments by default are entered only after a defendant has been served and to proceed *ex parte* is to proceed alone without further response from the opposing party. The propriety of the Florida ruling as to these matters should have been attacked in that court.

The decree granted Petitioner an undivided one-half interest in personal property in Pennsylvania referring to it as a "lump sum alimony" order. The designation of alimony is of no moment to this court as will be discussed hereafter. If the court had personal jurisdiction over Respondent, it is sufficient basis to settle the marital status of the parties because the issue before that court was the marital obligations of Respondent to Petitioner.

In rem jurisdiction over the personalty in Pennsylvania did not exist with the Florida court. The basis of *in rem* jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state. *Rose v. Himely*, 4 Cranch 241; *Overby v. Gordon*, 177 U.S. 214, 20 S.Ct. 603, 44 L.Ed. 741 (1900), and such jurisdiction is based on the physical power of the forum state and the coordinate authority of sister states. *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917). *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152, 61 L.Ed. 386 (1917); *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1942). Petitioner alleges that the property of Respondent located in Pennsylvania is before the Florida court by his having stipulated to and signed a Trust Agreement authorizing a Trustee to take possession of the assets of the Corporation. However, the Trustee never took possession of the property nor did the Florida court act upon the agreement. The situs of the assets not being in the possession of the Trustee appointed by the parties nor within the jurisdictional boundaries of the State of Florida, there was no jurisdiction over the assets by Florida. See, *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958).

A judgment *in rem* affects the interests of all persons in designated property. Restatement of the Law of Judgments, Section 5-9. The judgment of the decree of the Florida court as it applied to the assets of the Respondent was *in rem* because it imposed burdens on the interests in the Corporation. In this particular proceeding, we are asked to make an *in rem* judgment, as to Respondent's property within our borders and over which Pennsylvania has physical power, by giving full faith and credit to a valid Florida decree which acts partly *in personam* and partly *in rem*.

No state will directly enforce a duty to support created by the law of another state. Restatement, Conflict of Laws, § 458; *Commonwealth ex rel. Bucciarelli v. Bucciarelli*, 162 Pa. Super. 582, 60 A.2d 554 (1948); *Commonwealth v. Rohanna*, 167 Pa. Super. 338, 74 A.2d 807 (1950); and no action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests. Restatement, Conflicts of Laws, Section 610; *Steckler v. Pennroad Corporation*, 136 F.2d 197 (C.A. 3rd Cir. 1943).

Petitioner wishes this court to enforce a Florida decree which attempts to award an interest in property located in Pennsylvania which interest it attempts to create by way of a "lump sum alimony" award.

The law of Pennsylvania gives Petitioner the right to partition personal property owned jointly by two or more persons, when joint ownership is admitted or established at a hearing in the county in which the property is located. The Act of April 27, 1972, P.L. 460, No. 294, § 1, 12 P.S. 1791 *et seq.*, as amended, provides *inter alia*:

§ 1791 Partition of Personal Property Jointly Owned

> "Whenever personal property is owned jointly, by persons who are not partners, or are not husband and wife, and any one of such persons desires to dispose of his or her right, title, and interest in said personal property . . . it shall be lawful for such person to petition to the court of common pleas of the county wherein such property is situated, citing the facts of such joint ownership, the value of the property . . . whereupon the court shall appoint a trustee . . ."

§ 1795 Distribution of Proceeds

> "When the entire personal property is sold by the said trustee and an account having been filed, the parties may agree as to the distribution . . . And in case no distribution can be agreed upon, then the court may direct an audit of the said account . . . and at said hearing the interest of the respective parties may be established, whereupon the court may make decree of distribution."

Section 73, 10A, Florida Jurisprudence, with appropriate citations omitted herein, explains that:

> "There are two circumstances under which an award may be made to the wife based on her special equities in her husband's property: (1) where the wife has contributed financially to the husband's business or acquisition of property, and (2) where her personal services contributed materially to the husband's acquisition of property. Such an allowance is only warranted by special facts and circumstances in favor of the wife for her contributions to the husband's property accumulations, above and beyond the performance of marital duties, and the burden of proof is on the wife to sustain her claim of a special equity. *An award for a special equity in property held during coverture is not alimony** or dependent upon the right to recover alimony, and while alimony may be denied on the ground that the spouse has been guilty of adultery, an award for a special equity cannot be denied on such ground.

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* Emphasis ours.

> "Although not as well established, the husband has a reciprocal right based on his special equities in his wife's property."

There is no basis using the Pennsylvania law upon which to partition the Pennsylvania property of Respondent because the record indicates that all such property is titled solely in Respondent's name or in Respondent's and another, not a party hereto. The same result occurs using Florida's law but for different reasons.

The Florida law requires that before a wife may obtain an interest in her husband's solely owned business property, she must prove that she has contributed financially to the business itself or the acquisition thereof, or, has contributed personal services to the business. There having been no record of testimony or proceedings or exemplification thereof from the Florida court, we have no evidence of special equities being proven so as to allow us to find Petitioner an interested joint owner of the property located in Pennsylvania. Neither under Pennsylvania law nor Florida law does the mere fact of marriage import to one spouse an interest in property solely owned by the other spouse. Marriage being unable to give such interest in property, a divorce from the bonds of matrimony coupled with a "lump sum alimony" would not, absent "special equities", create the interest.

The Petition for partition will be dismissed.

Order

AND NOW, this 20 day of December, 1974, after hearing and consideration of the briefs of the parties, it is hereby ORDERED AND DECREED that the rule heretofore granted on motion of Dawn A. Whitmer to show cause why partition of personal property should not be granted and a trustee approved is discharged and the petition for the appointment of a trustee pursuant to the Act of 1927, April 27, P.L. 460, No. 294, § 1 *et seq.* is dismissed.

BY THE COURT,

SILVESTRI, J.

Eo die, exceptions noted and bill sealed.

BY THE COURT,

SILVESTRI, J.

Supreme Court, U. S.
FILED
JUL 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1582

DAWN A. WHITMER,

Petitioner,

vs.

EDWARD H. WHITMER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether an action founded solely on a Florida judgment can be maintained under a Pennsylvania statute which provides for the appointment of a trustee to partition property in Pennsylvania upon petition to the Pennsylvania court.

II. Whether a Florida court has jurisdiction over property situate in Pennsylvania.

Statement of Case

Petitioner obtained an Order of Court in Florida granting her a divorce, all of the respondent's property, real and personal, physically located in Florida and one-half of his per-

sonal property in Pennsylvania. The title of this order is "FINAL JUDGMENT" and Paragraph 4 thereof contains the following language: "This judgment shall act as a conveyance to the Petitioner of the property awarded to her in this Paragraph 4." The property referred-to was one-half of Respondent's personal property in Pennsylvania.

Subsequent thereto, Petitioner filed a pleading in the Court of Common Pleas of Allegheny County, Pennsylvania, entitled, "Petition for Appointment of Trustee Pursuant to the Act of April 27, 1927, No. 294, 12 P.S. 1793." Petitioner's purpose in filing this pleading was to have a trustee appointed who would appraise and sell Respondent's Pennsylvania property and distribute half the proceeds to Petitioner.

Beginning with Section 1791, the said Act states:

> "Whenever personal property is owned jointly, by persons who are not partners; or are not husband and wife, and anyone of such persons desires to dispose of his or her right, title and interest in said personal property, and cannot arrive at a satisfactory arrangement with the other owner or owners of such personal property, it shall be lawful for such person to petition to the court of common pleas of the county wherein such property is situated, citing the facts of such joint ownership, the value of the property, and the inability of the joint owners thereof to agree to the amiable disposition thereof; whereupon the said court shall appoint a trustee for said personal property, which trustee, upon the filing of a bond in a sum in double the amount of the value of the personal property as set forth in said petition, conditioned upon the faithful performance of the duties of the said trustee as herein set forth; shall take immediate possession of said property."
> 1927, April 27, P. L. 460, N. 294 Sec. 1.

The said Act is quite clear that the property sought to be partitioned must be (1) "owned jointly" and (2) one of the joint owners must desire to dispose of "his or her right, title, and interest in said personal property." The Act is also clear that the person seeking the partition must establish the joint ownership of the property to be partitioned.

The Pennsylvania courts held that there was no basis to use the above law to partition Respondent's Pennsylvania property (Petition for a Writ of Certiorari—Appendix pages 11a and 23a) and, therefore, denied the Petition for Appointment of Trustee.

Argument

It is respectfully submitted that that the denial of a Petition for Appointment of Trustee under a Pennsylvania statute which sets forth specific requirements which must be met before such trustee can be appointed and partition can be accomplished does not involve a federal question which merits the consideration of the Supreme Court of the United States.

Petitioner's contention is that there is a general confusion and conflicting decisions in regard to the exceptions to the Full Faith and Credit Clause of the Constitution. It is respectfully submitted that there are a number of cases decided by this court dating back to the early 1800's which have set forth the principle of law that a court does not have *in rem* jurisdiction over property located outside the boundaries of the state or country from which the court's power is derived.

As early as 1808, Chief Justice John Marshall said, "It is repugnant to every idea of a proceeding in rem to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its

property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely ex parte." *Rose v. Himely,* 4 Cranch (8 U.S.) 240 at page 277, 2 L. Ed. 608, 619.

This principle was followed in *Pennoyer v. Neff,* 95 U.S. 714, 722, 24 L. Ed. 565 (1877); in *Overby v. Gordon,* 177 U.S. 214, 221-222, 20 S. Ct. 603, 606, 44 L. Ed. 741 (1899) and in *Hanson v. Denckla,* 357 U.S. 235, 246, 78 S. Ct. 1228, 1236, 2 L. Ed. 2d 1283 (1958).

It is respectfully submitted that here the forum state is Florida and the subject property is not present in Florida. This court has always held that under such circumstances, the judgment of the forum state carries no efficacy into the state where the property is situate.

Since the law is clear in cases of this kind and has been set forth by this court all the way back to 1808, it is submitted that the issues presented are not such that merit the time and consideration of this court.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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AND GERACE,
Attorneys for Respondent.